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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 170

ILLINOIS CENTRAL RAILROAD COMPANY,
Petitioner,

vs.

ARTHUR ALFORD, ET AL.

TITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT AND BRIEF IN SUPPORT
THEREOF.

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vs.

ARTHUR ALFORD, ET AL.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

MAY IT PLEASE THE COURT:

The petition of Illinois Central Railroad Company respectfully shows to this Honorable Court:

A

Summary Statement of the Matter Involved

This is a tort action by neighboring property owners to recover damages of petitioner, an authorized railroad doing interstate business, claimed to have been suffered by their property and themselves personally as a result of emissions of smoke, soot and cinders from petitioner's coal-burning

engines used in petitioner's public utility business at Bossier City, a small municipality in the State of Louisiana. There was no charge that petitioner's roundhouse facilities had been improperly or negligently located or that the alleged nuisance was the result of the use of soft coal as a fuel, although that (the use of soft coal) is the sole ground on which the Court of Appeals found defendant had maintained a nuisance and, accordingly, affirmed the judgment.

Petitioner by appropriate pleadings denied that its operations constituted an actionable nuisance or that smoke or other substances emitted from its engines during the times they were being serviced for road and switching work damaged respondents' property or caused them substantial personal injury (R. 1-90).

A jury trial was waived.

The District Court in a written opinion, handed down on September 24th, 1949 (R. 10-2674) and in its Special Findings of Fact (R. 10-2742), obviously concurred in and adopted by the Court of Appeals, found that "defendants facilities are far in advance of the facilities used by railroads generally to prevent or suppress smoke or other deleterious substances," and "defendant has done all that can be done to prevent the creation or emission into the air of smoke or other deleterious substances, and, according to the weight of testimony, no one has yet been able to suggest any additional method or device" (R. 10-2737-8). These findings of fact are wholly inconsistent with any liability whatever.

The District Court further found that "the residential area is very clean in every particular; no person driving through would ever suspect an existing nuisance-cancer as was described," and that this fine, clean appearance was found to exist at the times "the area was visited by the trial judge, on which occasions, during the trial and after

its close, no black smoke was seen—only white, steam like smoke that at once vanished in the air'' (OP R. 10-2680-1); that ''the coal, mine run, had a sulphur content of from one (1%) to three and one-half (3½%) per cent,'' the SO_2 being further reduced by the ''dilution taking place in the fire box of the locomotive'' and by a ''washing or scrubbing process when an engine is being fired''; that ''each of the radial tracks in the roundhouse area is equipped with a bell-shaped device, inverted, which is lowered and set over the smoke stack of the locomotive being serviced, and during the time the locomotive is being fired or serviced is constantly sprayed with water of a temperature of 180 degrees Fahrenheit and a pressure varying from 150 to 225 pounds per square inch for the purpose of washing the stack gases and depositing them on the ground instead of permitting their escape into the air'' (R. 10-2737); that ''an over-fire airfork, with a compressed air pressure of about 100 pounds per square inch, in the bed of the locomotive, furnishes additional oxygen for a quicker combustion of coal and thereby keeps the creation of smoke within unavoidable limits''; that ''the personnel'' of petitioner ''have at all times given zealous attention to the conservation of coal and the suppression of smoke''; that ''there never was and there is no damage now to the paint (exterior or interior) on the houses of the plaintiffs caused by defendant's engines or operations'' (Findings R. 10-2735-8); that ''any damage before and after December 1, 1948, to the screens and draperies of plaintiffs' houses has been from gas-water vapor, resulting from the burning of natural gas for heat in space or open heaters (inside plaintiffs' houses) or from normal atmospheric conditions ordinarily prevalent'' (R. 10-2682); that the ''health of not a single man, woman or child was damaged'' by defendant's operations (OP R. 10-2694-2735); that ''there has not been a single instance of a reduction in

value, the sale of lots with their pretty and attractive houses upon them has always been brisk" (R. 10-2739).

In its Conclusions of Law the Court found that a smoke nuisance may exist in the absence of negligence—negligence not being "the deciding point" (R. 10-2741). The Court refused to find, as requested by defendant, that no actionable nuisance (no complaint being made of improper location) can exist in the absence of negligence.

In irreconcilable conflict with this factual situation, the trial court nevertheless found that a nuisance existed prior to December 1, 1948, but had been abated on that date, and awarded damages to plaintiffs in the aggregate amount of $43,661.66 (R. 10-2698), including damages to paint and screens when none was found to have existed.

From the judgment of the District Court, believed to be manifestly erroneous, an appeal was prosecuted to the United States Court of Appeals for the Fifth Circuit.

In an opinion handed down on February 9, 1951, the Court of Appeals affirmed the judgment appealed from and held that "common sense and experience lend support to the finding below, that the smoke nuisance here was directly and materially contributed to by appellant's burning of soft or bituminous coal" (R. 10-2769), although no such ground for recovery was pleaded and no such finding of fact was made by the District Court.

An application for a rehearing was denied on May 14, 1951 (R. 10-2776).

Petitioner claims grievous error in the opinion and ruling of the Court of Appeals, as well as of the District Court, and here seeks relief through the supervisory jurisdiction of this Court.

B

Jurisdiction to Review

The statutory provision believed and relied upon to sustain the jurisdiction of this Court to grant certiorari is:

Title 28, U.S.C.A., Sec. 1254, Act of Congress June 25, 1948, C 646, 62 Statutes 928, Rule 38 of this Court.

C

The Questions Presented and Errors Assigned

The decree here questioned is erroneous because:

(1) The mere use or burning of soft coal, in a normal and non-negligent manner, as fuel for petitioner's locomotives engaged in the doing of its public utility business (the use of this type of fuel not forbidden nor regulated by statute or ordinance) did not in and of itself constitute or contribute to an actionable nuisance, per accidens.

To condemn petitioner to pay a substantial sum of money to neighboring property owners for the ordinary and consequential damage unavoidably resulting from the non-negligent use of soft coal for its motive power is gross error —the practical effect of such decree is to take from petitioner its property and prevent the normal performance of its public utility business, without due process of law and without just compensation, in contravention to the Fifth Amendment to the Constitution of the United States.

(2) In the absence of negligence, a railroad, including its facilities for the servicing of its locomotives, constructed and operated for public use is not subject to an action by neighboring property owners for the ordinary, incidental, and consequential damage arising from the necessary emission of smoke from its locomotives; from which damages a

railroad enjoys immunity, a "doctrine which has become so well established that it amounts to a rule of property".

Reasons Relied On for the Allowance of the Writ

(1) The decision here questioned is on conflict with the decision of this Court in *Richards* v. *Washington Terminal Company,* 233 M. S. 546, and in conflict with the decisions of the Court of Appeals, Third Circuit, in *Bunting* v. *Pennsylvania Railroad Company,* 203 F. 193, and of the Court of Appeals, Third Circuit, in *Catholic Church* v. *Pennsylvania Railroad Company,* 207 F. 897, and of the Court of Appeals, Eighth Circuit, in *Kimball* v. *Guy A. Thompson, Trustee, Missouri Pacific Railroad Company,* 165 F. (2d) 677, on the same matter, each of which cases recognizes and applies the principle announced by this Court in *Richards* v. *Washington Terminal Company,* supra, that "railroads constructed and operated for the public use, although with private capital and for private gain, are not subject to actions in behalf of neighboring property owners for the ordinary damages attributable to the operation of the railroad, in the absence of negligence * * * ". The immunity from such damages "includes * * * the necessary emission of smoke and sparks from the locomotives and similar annoyance inseparable from the normal and non-negligent operation of a railroad".

(2) The ruling of the Court of Appeals that an actionable nuisance may be predicated on the use of soft coal as a fuel for a railroad's locomotives, in the absence of a finding that it was used or burned in a negligent manner (the trial court, whose findings of fact were affirmed or approved by the Court of Appeals, having found that petitioner's operations were not conducted in an unreasonable or negligent manner), imposes on petitioner and other railroads and industry generally an unjust and undue burden, since coal is the nation's major or predominant fuel, and it in effect

deprives petitioner of its property without due process of law and without conpensation.

(3) This ruling does violence to universally accepted law that smoke, inherent in the burning or combustion of coal, is not in itself an actionable nuisance. It becomes such only when created and emitted in unreasonable, excessive and avoidable amount, and causes substantial damage to adjacent proprietors.

(4) The principle announced by the Court of Appeals, the correctness of which is here questioned, is of such peculiar gravity and general importance and nation-wide interest, affecting materially and substantially, as it does, the rail transportation systems of the nation so essential to the commerce and prosperity of the nation and its defense in times of emergency, the Court, in the exercise of its sound judicial discretion, should grant certiorari and review the decree here questioned.

(5) The findings of fact by the trial court, adopted by the Court of Appeals, alone afford proof that the decree here questioned is lacking in factual support (R. 10-2742).

If, as the Court found, petitioner has done all that can be done to keep the "creation of smoke within unavoidable limits", that the "residential area is very clean in every particular"; that "there never was and there is no damage now to the paint (exterior or interior) on the houses of the plaintiffs caused by defendant's engines or operations"; that the damage before and after December 1, 1948, to the screens and draperies of plaintiffs houses has been from gas-water vapor * * * or from normal atmospheric conditions ordinarily prevalent; "that there has not been a single instance of a reduction in value, the sale of lots with their pretty and attractive houses upon them has always been brisk", (R. 10-2735-8, 2694-2735-39), factual support for the ruling that an actionable nuisance in fact existed is absent. Such findings negative damage and injury. Absent

substantial property damage and tangible injury resulting in actual, physical discomfort, (annoyance, inconvenience or discomfort not constituting a nuisance) no actionable nuisance exists. (Am. Jur., Nuisances, Vol. 39, Secs. 16, 26, 27, 28, 30, 54).

Wherefore, your petitioner respectfuly prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the said United States Court of Appeals for the Fifth Circuit, commanding that Court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 13,246, "Illinois Central Railroad Company, Appellant, vs. Arthur Alford, et al., Appellees", and that said decree and judgment of the United States Court of Appeals for the Fifth Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner ever prays.

ILLINOIS CENTRAL RAILROAD COMPANY.
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 170

ILLINOIS CENTRAL RAILROAD COMPANY,
Petitioner,

vs.

ARTHUR ALFORD, ET AL.,
Respondents

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

I

The opinion of the District Court is reported in 86 F. Supp. 424.

II

The opinion of the Court of Appeals, Fifth Circuit, is reported in 187 F. R. (2d Series) 144.

III

Jurisdiction

The statutory provision believed and relied upon to sustain the power to grant this petition is:

Title 28, United States Code, Judiciary and Judicial Procedure, Section 1254.

IV

Specification of Errors

The decision of the Court of Appeals, here complained of, is fundamentally erroneous in these respects:

(a) In holding that the mere use or burning of soft or bituminous coal as fuel for a railroad's engines, even though such use be in a normal and non-negligent manner, constitutes an actionable nuisance or contributes directly and materially to an actionable nuisance; the effect of which holding is to deprive petitioner of the use of this fuel essential to its transportation business, and thus take from petitioner its property without due process of law, in contravention of the Fifth Amendment to the Constitution of the United States;

(b) In holding that an actionable nuisance may be predicated on the mere use or burning of soft coal, the Court below has departed from universally accepted law that smoke becomes an actionable nuisance only when created and emitted in unreasonable and excessive amount, with consequent substantial damage to neighboring proprietors;

(c) In denying to petitioner the long-recognized immunity from the ordinary damages attributable to the necessary emission of smoke from its locomotives, inseparable from normal and non-negligent operation.

V

Statement of the Case

Some one-hundred fifty-seven property owners living in a subdivision of Bossier City, Louisiana, two-thirds of whose houses have been built since petitioner established in 1933 its roundhouse facilities on a ten acre tract, "sepa-

rated by a wide public highway from the area in which respondents' homes are located", claim damages of petitioner on the ground that smoke from petitioner's engines while they are being re-fueled infiltrates their homes and damages the paint and screens of their homes and causes them to suffer physical inconvenience and discomfort. There was no allegation that petitioner's facilities for servicing its locomotives were improperly located in that they were located in such close proximity to respondents' homes as to constitute an actionable nuisance. The Court found that petitioner's facilities were not improperly or negligently located (R. 10-2674).

Petitioner denied that its operations constituted a nuisance.

A jury trial was waived.

The District Court, in a written opinion, handed down on September 24, 1949 (R. 10-2674), held that no nuisance existed on December 1, 1948 but that a nuisance existed prior to that date, although the factual situation was precisely the same before December 1, 1948 as it was on that date, and awarded damages to plaintiffs in the aggregate amount of $43,661.66. Judgment was entered November 28, 1949 (R. 10-2744).

The Court of Appeals, in an opinion handed down on February 9, 1951, affirming the judgment of the District Court, held that "common sense and experience lend support to the finding below, that the smoke nuisance here was directly and materially contributed to by appellant's burning of soft or bituminous coal" (R. 10-2769). There was no "finding below" that the nuisance was the result of petitioner's burning of soft coal. This type of fuel was used by petitioner on December 1, 1948 as well as before. Petitioner's application for a rehearing was denied on May 14, 1951 (R. 10-2776).

The District Court, in its Findings of Fact (R. 10-2742) and in its Opinion (R. 10-2674), concurred in and adopted by the Court of Appeals, found that the "average consumption of coal" by petitioner's "engines, engaged in all types of service, during a twenty-four hour period was eighteen tons"; "excluding coal consumed in running operations, the consumption during a twenty-four hour period was seven and one-half tons"; "the coal, mine run, had a sulphur content of from one (1%) to three and one-half (3½%) per cent", the SO_2 being further reduced by the "dilution taking place in the fire box of the locomotive" and by a "washing or scrubbing process when an engine is being fired"; that "coal, before it is dropped from the elevator into the tender of an engine is subjected to a spray of hot water to prevent the fine coal dust from being blown into the atmosphere"; that each of the "radial tracks in the roundhouse area is equipped with a bell-shaped device, inverted, which is lowered and set over the smoke stack of the locomotive being serviced, and during the time the locomotive is being fired or serviced its stack is constantly sprayed with water of a temperature of 180 degrees Fahrenheit and a pressure varying from 150 to 225 pounds per square inch for the purpose of washing the stack gases and removing the solids and depositing them on the ground near the locomotive instead of permitting their escape into the air" (R. 10-2737); "an overfire airfork, with a compressed air pressure of about 100 pounds per square inch, in the bed of the locomotive, furnishes additional oxygen for a quicker combustion of coal and thereby keeps the creation of smoke within unavoidable limits"; "these and other improved devices for the suppression of smoke were installed by the defendant whose trained personnel operated them in a prudent manner". "The personnel" of petitioner "have given zealous attention to the conservation of coal and the suppression

of smoke". "These facilities are far in advance of the facilities used by railroads generally to prevent or suppress smoke, or other deleterious substances". Defendant has done all that can be done to prevent the creation of "emission into the air of smoke or other deleterious substances, and, according to the weight of testimony, no one has yet been able to suggest any additional method or device", (R. 10-2737-38); that "there never was and there is no damage now to the paint (exterior or interior) on the houses of the plaintiffs caused by defendant's engines or operations" (R. 10-2735-8), but notwithstanding this finding of fact the Court awarded damages for this item; "that any damage before and after December 1, 1948, to the screens and draperies of plaintiffs' houses has been from gas-water vapor, resulting from the burning of natural gas for heat in space or open heaters or from normal atmospheric conditions ordinarily prevalent" (R. 10-2682), but notwithstanding this finding of fact damages were allowed for this item; that "the health of not a single man, woman or child has been damaged" (R. 10-2694-2735); and "there has not been a single instance of reduction in value, the sale of lots with their pretty and attractive houses upon them has always been brisk" (R. 10-2739).

Point 1

It was error for the Court of Appeals to hold that the creation of a nuisance may be predicated solely on the burning of soft coal.

Bunting v. *Pennsylvania Railroad Company*, 203 F. 193;

Mayor of Jersey City v. *Abercrombie*, 58 Atl. 73;

State v. *Erie R. Co.*, 84 Atl. 698;

State v. *Erie R. Co.*, 87 Atl. 141.

POINT 1-A

To deprive petitioner of the use of soft coal for its motive power is to take petitioner's property without due process of law.

If, as the Court found, the use or burning of soft coal constitutes an actionable nuisance or contributes directly thereto, even though it is burned in a careful and non-negligent manner, and even though one has done all that can be done to keep the smoke inherent in such use within unavoidable limits, it necessarily follows as a practical result that petitioner will be deprived of the use of its motive power essential to the performance of its public utility business, for coal-burning engines constitute the greater part of its motive power, and thus petitioner's property will be taken without due process of law.

Although in recent years other types of fuel have come into use by railroads to generate motive power, the fact is that coal still constitutes as it has down the years the major or predominant railroad fuel, as also the nation's major fuel supply, and if, as the Court of Appeals holds, the non-negligent use or burning of soft coal is in itself an actionable nuisance or materially contributes thereto, not only the railroads but all users of this type of fuel are offenders against the law of nuisance. To so hold is the same as to hold that the burning of soft coal or the smoke necessarily created thereby is a nuisance absolute—a nuisance *per se*.

But smoke from the burning of coal is not a nuisance *per se*. It becomes an actionable nuisance only when by reason of improper operation it is emitted in unreasonable, unnecessary and avoidable amount and causes substantial injury to neighboring property or materially interferes with its use and enjoyment.

Am. Jur., Nuisance, Vol. 39, pgs. 310, 337;
Joyce on Nuisance, Secs. 135, 137, 139;

Wood on Nuisances, Secs. 505, 506, 507;
Richards v. *Washington Terminal Company,* 233 U. S. 546;
Tucker v. *V. S. & P. R.R. Co.,* 125 La. 689, 51 So. 689.

POINT 2

The operation of a lawfully constructed railroad including facilities for the firing of its locomotives, in the absence of negligence, does not by reason of attendant smoke or other annoyances necessarily incident thereto constitute an actionable nuisance.

Richards v. *Washington Terminal Co.,* 233 U.S. 546,
Catholic Church v. *Penn. RR Co.,* 207 F. 897,
Baltimore & P. R. Co. v. *Baptist Church,* 108 U.S. 317,
Northern Transportation Co. v. *Chicago,* 99 U.S. 635,
Beseman v. *Penn. RR Co.,* 50 N. J. L. 235,
Kimball v. *Guy A. Thompson, Trustee Missouri Pacific RR Co.,* 165 F. (2d) 677,
Tucker v. *V. S. & P. RR Co.,* 125 La. 689; 51 So. 689,
McGee v. *Y. & M. V. RR Co.,* 19 So. (2d) 21.

POINT 3

The decision here questioned is in conflict with the decision of this Court in *Richards* v. *Washington Terminal Company,* 233 U.S. 546, and with the decision of the Court of Appeals, Third Circuit, in *Bunting* v. *Pennsylvania Railroad Company,* 203 F. 193, and with the decision of the Court of Appeals, Third Circuit, in *Catholic Church* v. *Pennsylvania Railroad Company,* 207 F. 897, and with the decision of the Court of Appeals, Eighth Circuit, in *Kimball* v. *Thompson, Trustee, Missouri Pacific Railroad Company,* 165 F. (2d) 677.

In *Richards* v. *Washington Terminal Company,* this *Court* held:

"But the question remains, in cases of the class now before us, what is to be deemed a private nuisance such as amounts to a taking of property? And by great and preponderant weight of judicial authority in those states whose constitutions contain a prohibition of the taking of private property for public use without compensation, substantially in the form employed in the Fifth Amendment, it has become established that *railroads constructed and operated for the public use, although with private capital and for private gain, are not subject to actions in behalf of neighboring property owners for the ordinary damages attributable to the operation of the railroad, in the absence of negligence.* Such roads are treated as public highway, and the proprietors as public servants, with the exemption normally enjoyed by such servants from liability to private suit, so far as concerns the incidental damages accruing to owners of non-adjacent land through the proper and skillful management and operation of the railways. Any diminution of the value of property not directly invaded nor particularly affected, but sharing in the common burden of incidental damages arising from the legalized nuisance, is held not to be a 'taking' within the constitutional provision. The immunity is limited to such damages as naturally and unavoidably result from the proper conduct of the road and are shared generally by property owners whose lands lie within the range of the inconveniences necessarily incident to proximity to a railroad. It includes the noises and vibrations incident to the running of trains, the necessary emission of smoke and sparks from the locomotives, and similar annoyance inseparable from the normal and non-negligent operation of a railroad. Northern Transportation Co. v. Chicago, 99 U.S. 635, 25 L. Ed. 336; Besemen v. Pennsylvania RR Co., 50 N.J.L. 235, affirmed in 52 N.J.L. 221." (Italics ours.)

"The immunity from liability for incidental injuries is attended with a considerable degree of hardship to the private landowner, and has not been adopted with-

out some judicial protest. But, as pointed out by Chief Justice Beasley in the Beseman case, 50 N.J.L. at page 238, if railroad companies were liable to suit for such damages upon the theory that with respect to them the company is a tort-feasor, the practical result would be to bring the operation of railroads to a standstill. And, on the whole, the doctrine has become so well established that it amounts to a rule of property, and should be modified, if at all, only by the law-making power."

In *Bunting* v. *Pennsylvania Railroad Company,* Court of Appeals, Third Circuit, 203 F. 193, it was held:

> The proposition on which the plaintiff's case is put is that the defendant company has been negligent in firing these engines where they stood, and in going in and out of Broad Street station, so as to produce an unnecessary and avoidable quantity of smoke, constituting the nuisance complained of. This negligence is charged in two respects, namely, in making use of a variety of fuel on these engines while so standing, or while going in and out of the Broad Street tunnel, which emits, when burning, a large and unnecessary amount of smoke, and also in the manner in which its employees handle the furnaces and fires in its said locomotives and shops, and in omitting such devices and safeguards as would prevent such excessive production of smoke.
>
> "As to its manner of using bituminous coal, the jury found in favor of the railroad, and that it was guilty of no negligence in that respect. But it is contended the trial judge erred in withdrawing from the jury the question whether, in spite of this non-negligent use of bituminous coal, the railroad was guilty of negligence in not substituting a coke or anthracite coal therefor. We have given this contention the deliberation and thorough consideration which so grave and far-reaching a question demands. We are not convinced, however, that error was committed by the court's action in the premises."

After commenting on the testimony relative to the use of coke by other railroads, the court said, at page 196:

> "We do not mean to find that a general usage is an exclusive or final test in the premises, but that, where plaintiff undertakes to show, in a business so large and wide-extended as railroads, what has been done by other railroads as a test or standard of duty for the defendant, it must be made evident that what is proposed is not only scientifically practicable, but also economically and financially sound."

The court continued at the bottom of pages 197 and 198:

> "The plaintiff's case, as set forth in the statement of claim and as tried in the court below, as we have seen, rested solely upon two grounds: First, that by the use of a different kind of fuel in the operation of these locomotives, the injury complained of could have been avoided and therefore that failure to use such fuel was negligent.
>
> "Second, that it was negligence upon the part of the railroad company's servants, in the operation and management of these locomotives, and particularly in the operation and management of the fire thereon, which caused an undue and excessive emission of smoke.
>
> "It was not claimed in the pleadings nor seriously contended in argument, that defendant was liable, as for a nuisance, for maintaining its tracks, roundhouse and terminal in the place and position in which they were maintained. Liability was based on the specific charges of negligence in using a fuel that produced an unnecessary amount of smoke, and in not using reasonable care in firing the locomotives, so as to prevent the unnecessary emission of such smoke. In this salient feature, this case differs from that of the Baltimore & P. Ry. Co. v. Fifth Baptist Church, 108 U. S. 317, 27 L. Ed. 739, cited by plaintiffs in error."

The court then discussed the facts involved in *Baltimore and P. R. Co.* v. *Fifth Baptist Church, supra,* and commented, pages 198-9:

> "There is nothing in the report of the case to show that the action was maintained for, or that there was any question as to, the mere negligent use of the shops and premises of the defendant in consequence of which negligent use the nuisance arose. It was not the negligent use of lawfully maintained shops and roundhouse, but the maintenance itself of such shops in such close proximity to the church that the necessary and non-negligent use and occupation thereof constituted the injury complained of. It was the placing and maintenance of these works themselves so close to the church property, with their necessary and unavoidable accompaniments of noise, steam and smoke, and obstruction on the tracks entering the same, that constituted the nuisance. Such works could have been and should have been erected elsewhere."

In *Catholic Church* v. *Pennsylvania Railroad Company,* Court of Appeals, Third Circuit, the Court held:

> "It may be stated, therefore, as a principle well established by reason and authority, that the consequential, incidental and unavoidable annoyance or damage resulting to the occupiers of land adjacent to a duly authorized railroad, from its non-negligent and careful operation, does not constitute an actionable nuisance. It is also equally well established that, where such damages are the result of the want of due care and skill in the conduct and operation of the railroad, the defendant company is liable to those injured thereby."

In *Kimball* v. *Thompson, Trustee, Missouri Pacific Railroad Company,* the Court of Appeals, Eighth Circuit, held:

> "No citation of authority is necessary to demonstrate that in so far as the smoke, soot, etc. thrown

upon plaintiffs' property are due to the proximity of their property to the railroad tracks there can be no recovery of damages. Such injury as results from that fact is 'common to the public at large'. Any difference in amount is one of degree only. Carroll v. Wisconsin Cent. R. Co., 40 Minn. 168, 41 N. W. 661, 662. All homes constructed near a railroad or acquired after the railroad has been located and put in use are subject to the inconveniences necessarily incident to the reasonable operation of the railroad as a public utility. See Louisville & N. Terminal Co. v. Lellysett, 114 Tenn. 368, 85 S. W. 881, 1 L. R. A., N. S., 49 and cases cited.

"We next inquire what damage, if any, is recoverable because four or five times a day, an engine is spotted near plaintiffs' property when it might have been spotted a little further south toward Grace Street. The undisputed evidence, as stated supra, shows that homes are built up all along the bank on which plaintiffs' house stands south to Grace Street. But plaintiff George F. Kimball testified with reference to the relative amount of smoke and soot cast upon his house by the standing engines that 'We have the corner house and our house gets it worst'. Again, the excess complained of is one of degree only. When engines are spotted farther south for similar necessary purposes the neighboring property 'gets it worst'. In other words, the injury complained of is 'common to the public' whose property is situated as are plaintiffs' premises near the switchyard."

The magnitude of the issue here present, its general importance, affecting so seriously and adversely the operations of petitioner and other rail transportation systems, using coal-burning engines for motive power, and the apparent conflict of the decision here sought to be reviewed with the decisions in *Richards* v. *Washington Terminal Co.* and in *Bunting* v. *Pennsylvania Railroad Company,* and in *Catholic Church* v. *Pennsylvania Railroad Company,* con-

stitute, we submit, special and important considerations which justify if they do not compel the granting of certiorari.

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